No. 91-610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,

Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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EDITOR'S NOTE

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Preliminary Statement

Respondents[1] respectfully submit this brief in opposition to the brief of the United States as *amicus curiae*, to urge the Court to deny the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit. The issue in this case does not present an important issue of unsettled law that should be decided by the Court.

On the last page of his brief the Solicitor General asserts two reasons the Court should review this case. First, the Solicitor General claims, without reference to any supporting evidence, that the issue decided by the Second Circuit is of "manifest importance." Second, the Solicitor General asserts that there is a "square conflict" in the courts of appeals on this issue. As demonstrated herein, these assertions are not correct.

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[1] Respondents include the management trustees of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds (collectively, the "Southern Funds"), the employers and management companies that are members of the Southern New York Residential Health Care Facilities Association, Inc. (the "Southern Employers"), and individual employees of the Southern Employers ("Southern Employees").

II

THE SECOND CIRCUIT DID NOT ESTABLISH A *PER SE* RULE OF "MANIFEST IMPORTANCE"

The Solicitor General asserts that this case presents a question of "manifest importance" because the Second Circuit has created a "per se" rule requiring trustees of multiemployer Taft-Hartley plans to transfer reserves any time employees withdraw from those plans. *See* Brief of United States at p.6. The Second Circuit did not establish a "per se" rule that applies in every situation. Even the Solicitor General acknowledges that the Second Circuit "recognized the well-established rule that trustees are not required to transfer funds to a new plan whenever employees leave a plan" in *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985). Brief of United States at p.10. The Second Circuit's holding is limited to the unique facts of the instant case in which nearly 2,000 employees transferred benefit coverage from one set of multiemployer benefit plans to another set of multiemployer benefit plans. At the time of the transfer, the first set of funds possessed excess reserves that were derived in part from contributions made on behalf of the Southern Employees. Pet. App. at 10a.

Moreover, the issue of mandating the transfer of excess reserves among multiemployer plans when a significant group of employees transfer to coverage under new multiemployer plans rarely arises. The Solicitor General identifies only two cases, and petitioners cite only one other case, which they claim address the same issues present in the instant case. *See Sheet Metal Workers' Local 28 of New Jersey Welfare Fund, et al. v. Gallagher, et al.*, 140 L.R.R.M. (BNA) 2001 (3d Cir. April 3, 1992); *Trapani* v. *Consolidated Edison Employees' Mutual Aid Society, Inc.*, 891 F.2d 48 (2d Cir. 1989); *Stinson v. Ironworkers Dist. Council of Southern Ohio and Vicinity Benefit Trust*, 869 F.2d 1014 (7th Cir. 1989). The limited effect of the Second's Circuit decision does not present an issue of "manifest importance" justifying review by the Court.

III

NO OTHER CIRCUIT COURT IS IN CONFLICT WITH THE SECOND CIRCUIT

The Solicitor General also asserts that the Court should review the decision of the Second Circuit because it is in "square conflict" with the decision of the Seventh Circuit in *Stinson*, 869 F.2d 1014 (7th Cir. 1989). The Seventh Circuit specifically distinguished the Second Circuit's decision in *Local 50, Bakery & Confectionary Workers Union v. Local 3, Bakery & Confectionary Workers Union*, 733 F.2d 229 (2d Cir. 1984) ("*Local 50*"), the case on which the instant case is based. The Seventh Circuit noted instead that it was following the reasoning in the Second Circuit's decision in *O'Hare*. 869 F.2d at 1021.

The courts in *Local 50*, *Stinson*, *O'Hare*, and in the instant case, recognize that section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5) may require the transfer of reserves among multiemployer benefit plans under certain circumstances to remedy structural defects in the operations of Taft-Hartley trust funds.[2] In *dicta*, the *Stinson* court noted that, "at least in this case," it would not order a transfer of reserves under any circumstances. 869 F.2d at 1021. The Seventh Circuit focused on facts particular to that case: the nature of the construction industry; the movement of employees among different employers; and the predictable surges and declines in employment in the industry. Id. at 1021-1022. None of these facts are present in the instant case.

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[2] The Third Circuit also has endorsed the principle that courts may require a transfer of funds between Taft-Hartley trust funds under section 302(c)(5) under certain circumstances if necessary to remedy a structural defect in the operations of the trust funds, citing to the instant case, O'Hare and the district court opinion in *Local 50*, 561 F. Supp. 205 (E.D.N.Y. 1983), *aff'd*, 733 F.2d 229 (2d Cir. 1984). *See Sheet Metal Workers' Local 28*, 140 L.R.R.M. 2001 (BNA) (3d Cir. April 3, 1992).

The Solicitor General implies that the decision of the Court of Appeals is in conflict with *Stinson* because the Second Circuit, unlike the Seventh Circuit, permits "employees a right to trace and claim the contributions of their particular employers." Brief for United States at p. 7. The Second Circuit expressly rejected this conclusion, noting that "the benefits of individual employees need not be tied to their individual contributions." Pet. App. at 10a.

Conclusion

The question of whether section 302(c)(5) of the LMRA requires a transfer of excess reserves among multiemployer benefit plans in situations in which a significant number of employee-participants transfer from one set of multiemployer trust funds to another set of multiemployer trust funds is not an important question of unsettled law that should be decided by the Court. Based on the foregoing reasons, the Court should deny the petition for writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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